IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL SIDE JURISDICTION

Arbitration Application No. 182 of 2006

M/s Boghara Polyfab Pvt Ltd
111 Jeevan Deep Complex
Ring Road, Near Subjail
Surat, Gujarat ..Applicant

vs

National insurance Company Ltd
(through Divisional Manager)
Divisional Office No. 5
Kamani Chambers,
32, R.Kamani Marg, Ballard Estate
Mumbai 400038

Mr G.S.Kulkarni i/b Ms Swati Deshpande for the applicant.

Mr A.S. Vidyarthi i/b Mr S.M. Vidyarthi for respondent

CORAM:SWATANTER KUMAR,C.J

Judgment reserved on 13th April 2007

Judgmentdelivered on 19th April 2007

JUDGMENT:

In this arbitration application filed under section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to the as "the Act", the applicant prays for appointment of a sole arbitrator or in the alternative two arbitrators and presiding arbitrator and then requiring them to enter into the

reference to arbitrate the dispute between the applicant and respondent as stated in terms of the Policy No250501/l 1/03/3100145 dated 4th August 2004.

2. The factual metrixs of the case fall in a narrow compass. The applicant is a private limited company duly registered under the provisions of the Companies Act, 1956, with their registered office at Surat, Gujarat, which is engaged in import of chemicals like Acetone and Phenol as well as yarn. The respondent-National Insurance Company carries on business of insurance cover. Both the parties entered into an agreement (contract) dated 4th August 1983 and an insurance policy was issued in favour of the applicant. Entire South Gujarat received unprecedented rain starting from 2nd August, 2004. The accumulated water could not drain into the river as it coincided with high tide. Every nala, storm water, drainage etc swelled and the entire city and surroundings of Surat got flooded. The godowns, where the stocks were stored, were engulfed. The applicant suffered heavy losses because of the stock in the said godowns were spoiled and the applicant lodged a claim with the respondent with regard to the loss suffered by them. Initially the goods were insured for Rs. 3 crores located at its godown at Saroli at Surat, Gujarat. However, subsequently the insured sum was raised by an agreement dated 22nd September 2003 to Rs.6

crores and by a subsequent agreement dated 27th May 2004 between the parties to Rs.12 crores by paying additional premium of Rs.23,328/- as advised by the underwriter. However, according to the respondent the insured sum was not increased to Rs. 12 crores but only increased to 6 crores.

3. The applicant filed its claim on 6th December 2004 and a surveyor was appointed by the respondent, who investigated the claim and assessed the loss net of salvage as Rs.3,35,01,078/- and after deducting the compulsory excess, the net payable amount was worked out as Rs.3,18,26,025/-. The surveyor vide his report dated 6th December 2004 recommended the payment. This advice of the surveyor was not accepted and the respondent advised the surveyor to rework the amount payable on the basis of sum insured as Rs.6 crores instead of Rs.12 crores. The surveyor thereafter re-assessed the loss and recommended payment of Rs.2,34,01,739.73/- in March 2005 and thereafter under duress and compulsion, the respondent obtained full and final discharge voucher for a sum of Rs.2,33,94,964/- signed by the applicant, which was immediately refuted by the applicant. Vide their letter dated 24th March 2005, the applicant wrote to the Chairman, IRDA, protesting about the respondent's insurer's dilatory and coercive pressure tactics.

4. Clause 13 of of the policy contains an arbitration clause and in view of the dispute that the applicant was claiming a sum higher than the sum paid to them and there was a serious dispute with regard to the total value of the insurance cover, the applicant served a notice dated 27th May 2006 requesting for settlement of the claim and as no reply was received to the said notice, reminder dated 27th July 2006 was sent. Vide letter dated 2nd August 2006, the company informed the applicant that the claim had been fully settled and nothing survives. In these circumstances and having failed to get any relief from the respondent, the present application has been filed by the applicant. According to the applicant, the disputes which have been raised by the applicant and which, according to the applicant, are liable to be referred to the arbitrator for adjudication in accordance with law, have been stated in the notice as well as in the affidavit filed by them. The contention on behalf of the applicant is that the arbitration clause is wide enough to take in its ambit the claim raised by it and the full and final settlement being under duress and coercion, cannot prevent in law the dispute being referred to the arbitration. It is also contended by the applicant that the surveyor had approved the claim of Rs 3,18,26,025 and the payment of Rs 2,33,94,964/- by the respondent was by manipulating the report by subsequent correspondence, is clearly arbitrary and the applicant, in any case

was entitled to full claim, even if it is held that the applicant was not entitled to something over and above Rs.3 crores and odd.

5. On the contrary, the respondent claimed that no dispute subsists, in fact and in law, which could be referred to the arbitration in terms of arbitration clause between the parties. The surveyor had given his earlier report but the same was based on certain misconception which was corrected by the subsequent agreement/ corrigendum by the report of the surveyor and the corrected amount has been paid in full and final satisfaction of the claim and discharge certificate is binding upon the applicant company.

6. It is clear from the above narrated facts that there is no dispute to the arbitration agreement and existence of the policy. Whether the policy was covered loss to the extent of Rs.6 crores as alleged by the respondent or Rs.12 crores as alleged by the applicant, is again a question of fact, which is to be determined on merits, after the parties have given appropriate opportunity to produce evidence in support of their contentions. As far as ingredients of section 11 are concerned, there is no dispute to the fact that vide letter dated 27th July, 2006, the applicant had reminded the respondent company that they had failed to act despite passage of 7 months and they had in clear and

unambiguous terms stated that they would be constrained to approach the court for appropriate direction to constitute an arbitral tribunal in accordance with the provisions of the Act. The only plea raised by letter dated 2nd August 2006 and the submission of the respondent before this court as well, is that the full and final discharge voucher was not signed by the applicant, do not leave any dispute between the parties, which cannot be referred to the arbitral tribunal. Vide their protest letter dated 24th March 2006, while raising protest to the execution and contents of the discharge voucher, the following extract from the said letter can be relevantly reproduced:

> "Thereafter for the next 1 year, the insurance failed to settle our claim and made us run from pillar to post for the settlement.
>
> Finally on March 21st 2006, the insurers have sent us a voucher for the sum of Rs.2,33,94,964 which considering our dire financial condition, and the continuous failed promises from the insurance, we have had no choice but to accept.
>
> Sir, subsequent to the loss, since we could not pay our international suppliers on time they almost completely stopped all our shipments. This has resulted in tremendous financial loss to us. We have lost our long hard earned reputation in the

market by becoming defaulters. The insurers have deliberately starved our unit of funds to ruin us financially.

You will appreciate that we are now faced with a situation where we have no choice but to accept the payment being released to us unconditionally as the insurers have made it very clear that the payment will not be released if there is any conditional discharge of the vouchers. In order to safe guard our right to claim the difference amount and any other claims arising out of the financial losses incurred by us a direct result of the deliberate delay in settlement of our clam by the insurers, we make a humble, request to the IRDA to take up the matter with the insurers to ensure that

justice prevails and we are paid the entire compensation due to us"

7. The learned counsel appearing for the applicant, while relying upon the judgment of the Supreme Court in the case of Chairman and MD, NTPC Ltd vs Reshmi Constructions, Builders, and Contractors (2004) 2 SCC 663, argued that the dispute with regard to the recording of full and final settlement or complete discharge is a question of fact, which can be gone

into by the arbitral tribunal itself and in that regard arbitration clause can be invoked for reference of that dispute. In that case the Supreme Court was concerned whether accordance of satisfaction under the contract itself can be referred to the arbitration and the question was answered in the affirmative by the court and the court held as under:

> "Normally, an accord and satisfaction by itself would not affect the arbitration clause for even when rights and obligation of the parties are worked out, the contract does not come to an end, inter alia, for the purpose of determination of disputes arising thereunder, and, thus, the arbitration agreement can be invoked; but if the dispute is that the contract itself does not subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that the contract survives, recourse to the arbitration clause may be taken".

8. It may be noticed that the above judgment pronounced by the Supreme Court is prior to the law enunciated by the Supreme Court in the case of S.B.P & Co. Vs Patel Engineering and Ltd Anr -2005(8)SCC 618. However, that itself would be of no prejudice to the interest of the applicant. There can be very serious dispute with regard to the genuineness and effect of the

discharge voucher to be construed as full and final settlement, leaving no scope for subsisting any further dispute. It is not disputed that in terms of initial survey report submitted by the surveyor of the respondent company, the claim of the claimant was not paid but it was paid in terms of amended or corrigendum report submitted by the surveyor. The discharge voucher which is submitted by the applicant for Rs.2,33,94,964/-, which in fact was for even lesser amount and which was executed on 21st March 2005, itself was a dispute. As far as correct proportionate value of the insurance policy is concerned. Exhibit F is relevant document, which clearly shows that the insurance covered as on the date of loss was Rs. 6 crores and is a document of the respondent, showing to that extent the Respondent would be bound to assess and pay the loss in proportionate value. This itself again is a referable dispute. The court is of the considered view that there is serious dispute between the parties which requires reference to the arbitration. The findings recorded in this order are prima facie and thus would not be finally binding on the parties. The question of coercion and undue influence should be kept open in the facts and circumstances of the case and parties should be permitted to lead evidence before the Arbitrator even on this issue.

9. Clause 13 of the arbitration agreement postulates reference to be made to a panel of three arbitrators, one each to be appointed by the parties and the third arbitrator to be appointed by such two arbitrators in accordance with the provisions of the Act. The clause also states that the dispute would be referred, if the company has accepted the liability. In the present case the terms of the contract are clear and in any case the initial survey report is a document of the company and is sufficient to satisfy the ingredients of the arbitration clause. The respondent company has failed to act despite due notice in accordance with the provisions of section 11(3) and (4) of the Act. Once they failed to act then the appointment of arbitrators has to be made by the court. Loss of right of the respondent, in fact, to that extent, would be complete. Reference can be made in this regard to a Full Bench judgment of Delhi High Court in the case of HBHL VKS(J.V) vs Union of India and ors 2007(1) ARBLR 252 (Delhi). A reference can also be made to the decisions in the case of Naginbhai C Patel vs. Union of India, reported in 1999(1) Mh. L.J.745 and Larsen and Toubro Limited vs Konkan Railway Corporation Limited reported in 1999(1) Mh L.J.905, wherein the court proceeded to appoint arbitrators as the respondents had failed to exercise their right in accordance with the arbitration clause. Despite the procedure contemplated under clause 13 of the Policy, the prayer of the applicant is for

appointment of a sole arbitrator, even to minimise the expenses of the parties, and in fact there was no opposition thereto.

Accordingly this application is allowed, leaving the parties to bear their own costs. Shri Justice S.N.Variava (retired Judge of the Supreme Court) is appointed as the sole arbitrator to whom the disputes between the parties are hereby referred. The arbitration proceedings may be completed expeditiously.

The Prothonotary and Senior Master to communicate this order to the learned arbitrator.

CHIEF JUSTICE.